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No. 85-1053

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that on a challenge to the legal sufficiency of the evidence supporting Petitioner's state law fraud claim, and from its examination of all the evidence, Petitioner had failed to introduce sufficient evidence of an essential element of her fraud claim, requiring judgment for Respondent notwithstanding the verdict?

2. Did the Court of Appeals err in affirming the District Court's non-jury ruling for Respondent on sex discrimination and not adopting the jury's verdict on Petitioner's fraud claim, where the sex discrimination and fraud claims involved different legal and factual issues, different legal standards, and different evidence, and the jury found for Respondent on Petitioner's claim under the Equal Pay Act?

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STATEMENT OF THE CASE

Petitioner Christine Craft was a television newscaster at KMBC-TV in Kansas City from January to August, 1981, when KMBC was owned by Respondent. Petitioner filed a three-count complaint against Respondent in January, 1983, alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1981), the Equal Pay Act of 1963, 29 U.S.C. §206(d) (1978), and Missouri common law fraud.

After trial the jury rendered verdicts in Respondent's favor on the Equal Pay Act claim and in Petitioner's favor on the fraud claim. On October 31, 1983, the District Court found for Respondent on the Title VII claim and ordered a new trial on the fraud claim due to instructional errors and excessiveness of the damages awarded Petitioner by the jury. The District Court's opinion is reported at 572 F.Supp. 868 (W.D. Mo. 1983).

At the new trial the District Court submitted Petitioner's fraud claim to the jury, which found for Petitioner. On appeal, the Eighth Circuit Court of Appeals held that the District Court erred in submitting the claim to the jury, as Petitioner had failed to introduce substantial evidence that Respondent had committed a fraudulent act. The Court of Appeals affirmed the District Court's ruling that Respondent had not discriminated against Petitioner and the first jury's verdict for Respondent on the Equal Pay Act claim. The opinion of the Court of Appeals is reported at 766 F.2d 1205 (8th Cir. 1985).

Petitioner now seeks review of the Court of Appeals' ruling on her fraud claim under Missouri common law. She claims that her employer (Respondent) defrauded her when it criticized and attempted to improve her on-camera television appearance, allegedly contrary to its prior representations that it intended "no makeover or substantial changes" in her appearance.

Although Petitioner's claim was for affirmative misrepresentation, not for failure to disclose, the Petition before this Court demonstrates that Petitioner now modifies her claim by referring to Respondent's supposed failure to tell her about some aspects of its operation. (Petition, 4-5). Petitioner never asked the District Court to submit a failure to disclose claim and she did not raise that issue in the Court of Appeals.

The Court of Appeals, relying on Missouri case law, held that Petitioner defined what was meant by the "no makeover or substantial change" representations in pre-employment negotiations. 766 F.2d at 1220. (Appendix to Petition, 29-30). Petitioner admitted that her concern about appearance makeovers arose from her employment two years earlier at CBS Sports (Tr. II 91), which she testified she described to Respondent as CBS forcing her

to cut her hair severely and dye it from light brown to platinum blonde, shaving her eyebrows and dying them black (Tr. I 64-65), having plastic surgery performed to correct a drooping eyelid (Tr. II 118-119), and each time before Petitioner appeared on-camera, a CBS technician applying "heavy" makeup to her face. (Tr. I 66-68). Robert Hamilton, an attorney who represented Petitioner in pre-employment negotiations with Respondent, told Respondent's news director, Ridge Shannon, "[y]ou know what CBS did to Christine. They tried to make her into something she was not. They tried to change her . . ." (Tr. III 45). In Petitioner's presence, Hamilton told Shannon that when Petitioner was at CBS, ". . . they really made an effort to fundamentally change her appearance, and she doesn't want to go through that." (Tr. III 11).

In her Statement of the Case, Petitioner opines that when she worked for Respondent, management evinced a " 'relentless' obsession" with her appearance. However, the Court of Appeals properly held that Respondent's acts during her employment did not substantiate her claim that the representation was false when made. 766 F.2d at 1219-21 & n. 17. (Appendix, 27-32). On only one out of more than 200 on-camera appearances did anyone but Petitioner apply her makeup. (Tr. II 117-18). Respondent never criticized Petitioner about her hair. Petitioner admitted that news director Shannon's comments about the asymmetry of her eyes and face paralleled an evaluation made by her plastic surgeon two years before. (Tr. II 118-19). She met with Respondent's consultant no more than three to five times during her eight months of employment, and those meetings for the most part dealt with the mechanics and technical aspects of newscasts, not appearance. Not until two weeks before her resignation was she told to wear specific items of clothing—which

Petitioner admits were provided to her at no cost and to which she did not object. (Tr. II 38, V 145; Pl. Ex. 163). Thus, as the Court of Appeals held, Petitioner's own evidence fails to support her claim that her appearance was fundamentally changed.[1]

In addition, Petitioner's Statement of the Case completely ignores the adverse results of audience research which was conducted several months into her tenure with Respondent.[2] It is uncontradicted that the audience response to Petitioner's performance and appearance was overwhelmingly negative. Because of the May, 1981 research results all offhand references to Petitioner's California background ceased and she received a clothing calendar to improve her on-camera appearance. (Tr. II 26, 127).

In August, 1981 Respondent received the final results of a telephone survey conducted in June and July of 1981. Again, Petitioner was viewed poorly by the audience in almost all aspects of her performance. On August 14, 1981 Respondent's news director informed Petitioner of the results and of the station's decision to reassign her from the co-anchor position (at no loss in pay) because of the

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1. The Court of Appeals held:

> The ultimate measure of the representation's truth or falsity is what Craft could reasonably have understood KMBC to have promised. She testified that a "makeover" was "changing someone's appearance" and that she had believed KMBC didn't want to change anything about her. This position, however, is not totally consistent with the "*substantial* changes" language submitted in the jury instruction. It seems plain, thus, that a jury could not have reasonably measured the falsity of KMBC's representation against Craft's subjective view of a "makeover" as any change at all.

766 F.2d at 1220 (Appendix, 29).

2. Ignoring the audience research evidence was the most glaring example of Petitioner's selective view of the evidence, as portrayed in her Statement of the Case.

research. Petitioner chose to quit, return to her previous employer, a television station in Santa Barbara, California, and file suit.

REASONS FOR DENYING THE WRIT

I. IN THE DECISION BELOW THE COURT OF APPEALS DETERMINED THE APPROPRIATE STANDARD OF REVIEW AND APPLIED THAT STANDARD PROPERLY IN HOLDING THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE DISTRICT COURT'S SUBMISSION OF PETITIONER'S COMMON LAW FRAUD CLAIM TO THE JURY.

Under the guise of the Seventh Amendment, Petitioner attacks the Eighth Circuit for comprehensively reviewing the evidence to determine its legal sufficiency. A review of the Eighth Circuit opinion manifests the Court's understanding of and allegience to the appropriate standard to be utilized by an appellate court in reviewing a claim based on Missouri law. The writ should be denied, for Petitioner has raised no constitutional or substantial federal question warranting review by the Supreme Court, nor has she demonstrated a conflict among the Circuits on a significant issue.

Petitioner ignores settled law requiring comprehensive review of the evidence when an appellate court is confronted with a challenge to the legal sufficiency of the evidence. This was not a case of appellate fact-finding, as Petitioner asserts, but a case involving a thorough consideration of all the evidence for legal sufficiency. The Courts of Appeals unanimously agree that assessment of the legal sufficiency of the evidence is for the court, not a jury. *See, e.g., Holter v. Moore & Co.*, 702 F.2d 854, 855 (10th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 347

(1983); *U.S. v. Bucon Construction Co.*, 430 F.2d 420, 423 (5th Cir. 1970). *See also*, 9 C. Wright & A. Miller, *Federal Practice and Procedure*, ¶2524, at 541 (1971).

Under both Missouri and federal law, a plaintiff must introduce substantial evidence to support the submission of a claim to the jury. *Boeing Co. v. Shipman*, 411 F.2d 365, 373-77 (5th Cir. 1969) (*en banc*); *Rowe v. Farmers Insurance Co., Inc.*, 699 S.W.2d 423, 429 (Mo. 1985) (*en banc*) (Blackmar, J., concurring) ("Missouri . . . disclaims the *scintilla* rule and holds that every element of a case must be established by substantial evidence."); *Jones v. Garney Plumbing Co.*, 409 S.W.2d 637, 645 (Mo. 1966). The Court of Appeals thus applied the proper standard in holding that absent substantial evidence of an element of her claim, Petitioner's claim must fail. 766 F.2d at 1218 (Appendix, 25); *Bauer v. Adams*, 550 S.W.2d 850, 853 (Mo. App. 1977). The Court of Appeals' obligation was to examine the entire record, consisting of over twenty volumes of transcript and dozens of exhibits, to determine whether, under controlling Missouri law, Petitioner introduced substantial evidence of each element of her fraud claim. As the Court of Appeals did in this case, the Missouri courts have engaged in precisely such an analysis of the evidence in fraud cases and often have granted judgment for defendants notwithstanding the verdict. *Grosser v. Kandel-Iken Builders, Inc.*, 647 S.W.2d 911 (Mo. App. 1983); *Bauer v. Adams; Klecker v. Sutton*, 523 S.W.2d 558 (Mo. App. 1975).

The verdict-directing instruction requested by Petitioner and submitted to the jury contained the representation by Respondent that it intended "no makeover or substantial changes in [Petitioner's] appearance." As the Court of Appeals properly held, Missouri law required Petitioner to prove that Respondent did not intend to perform consistently with those words at the time they were ut-

tered. 766 F.2d at 1219. (Appendix, 27). In examining the evidence to determine whether Petitioner introduced substantial evidence of intent, the Court followed Missouri law in holding that Petitioner defined the representation by her detailed discussion of CBS:

> [t]he language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used. [*Toenjes v. L. J. McNeary Construction Co.*, 406 S.W.2d 101, 106 (Mo. App. 1966)]. KMBC's statements to Craft were made in response to her expressions of concern about her experience with CBS, where the network had required that her hair be cropped and dyed blond, her eyebrows shaved and dyed black, and heavy makeup applied.

766 F.2d at 1220. (Appendix, 30). Having defined the representations, Petitioner could not ascribe an even broader meaning to them at the time of trial, cf. *Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 43 (Mo. 1982) (*en banc*), nor can she do so before this Court.

According to Petitioner, any claim should go to the jury, regardless of how strained the necessary inferences. Without citation to the record, and no basis in the evidence, she asserts that Respondent had a ". . . conceded intent to change Craft's appearance . . ." (Petition, 18). The Court of Appeals correctly rejected that conclusion, as Respondent never conceded such intent, and the inferences Petitioner asserted did not reasonably point toward fraudulent intent. 766 F.2d at 1220-21. (Appendix, 30-32). The Court of Appeals properly followed Missouri law that evidence in a fraud case which is susceptible of conflicting inferences must be viewed as supporting honesty and good faith, not perversity or bad faith. *Macon-Atlanta State Bank v. Gall*, 666 S.W.2d 934, 941 (Mo. App.

1984). Petitioner's strained analysis of the inferences could not by itself raise a jury question, as the Court of Appeals held in determining and applying the appropriate standard of review.

Finally, Petitioner accuses all of the Circuits of routinely applying improper standards of appellate review. She bases that accusation solely upon the Eighth Circuit's decision in her case and an inherently suspect "statistical analysis" of each Circuit's reversal rate over only one year. From her solely quantitative analysis, Petitioner concludes that the appellate courts have usurped every litigant's right to a jury trial every time a reversal was grounded on a failure to make a submissible case.

One cannot respond to an "analysis" so totally lacking in scientific basis, as it is dependent on an unexplained methodology grounded on subjective opinion as to the grounds for reversal, and excludes the large number of unreported decisions or summary dispositions—which are almost always affirmances—and decisions which do not reach the issue of sufficiency of the evidence. Despite these glaring defects in her "statistics," Petitioner concludes that a certain rate of reversal proves a constitutional violation. This "study" lends no support to Petitioner's claim that the Circuits only pay "lip service" to the Seventh Amendment and violate its mandate flagrantly.[3] (Petition,

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3. In addition to accusing it of usurping her right to jury trial, Petitioner claims the Eighth Circuit was motivated by prejudice against her. She accuses the Eighth Circuit of "duplicity" (Petition, 22 n. 16), "single-minded bias" (Petition, 18 n. 14), conducting "blatantly false" fact-finding (Petition, 20), and evincing an anti-female attitude. (Petition, 21). In like fashion, on appeal to the Eighth Circuit, Petitioner accused the District Court of "preconceived bias" against her. (Brief of Appellee/Cross-Appellant, at 27 n. 9). Petitioner's statistics with respect to other Circuits' usurpation of litigants' jury trial rights are not ascribed any motive, sex discrimination or otherwise, nor does Petitioner refer to any scholarly research supporting her conclusions about these "statistics."

15). With respect to the cause before this Court, however, there is an opinion and a record which disproves Petitioner's claim.

Petitioner thus presents no constitutional issue, no substantial federal question, nor any conflict among the decisions of the various Courts of Appeals. The Petition should be denied.

II. THE COURT OF APPEALS DETERMINED AND PROPERLY APPLIED THE APPROPRIATE STANDARD OF REVIEW OF THE DISTRICT COURT'S RULINGS ON PETITIONER'S TITLE VII CLAIM, AND PROPERLY FOUND THAT THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT CLEARLY ERRONEOUS.

After the August, 1983 trial in Kansas City, the District Court found against Petitioner on her claim of sex discrimination under Title VII. The Court of Appeals correctly held that it could reverse that ruling only if clearly erroneous under Rule 52(a), Fed. R. Civ. P. After examining the evidence, the Court of Appeals properly found that the District Court's findings were not clearly erroneous.

Petitioner now claims that in rendering its decision on the Title VII count, the District Court should have followed the jury's findings arising out of the fraud count. (Petition, 21-24). The Court of Appeals did not address this point and therefore the point is not in a posture for consideration by this Court on a writ of certiorari. *Brandon v. Holt*, ... U.S. ....., 105 S.Ct. 873, 879 n. 25 (1985).

Even if the point is properly before this Court, Petitioner overlooks the fact that the jury found for Respon-

dent on the Equal Pay Act count, conclusively undermining her assertion that the jury found all of the factual issues in her favor. Further, the sex discrimination and fraud issues presented to the District Court and the jury, respectively, did not "overlap," Petitioner's assertion to the contrary notwithstanding. The "critical factual issues" were not "largely the same," as Petitioner asserts. (Petition, 22). The jury ruled on fraud while the District Court faced the issue of discrimination. As this Court recently held, in a Title VII case, discrimination *vel non* is a factual issue to be decided solely by the trial judge. *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982).

The respective burdens of proof were different, the Title VII claim being controlled by the federal shifting burden of proof analysis outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 440 U.S. 248 (1981), while the burden of proof on the fraud claim was governed by Missouri law, outlined, for example, in *Bauer v. Adams*, 550 S.W.2d at 852-53. In addition, the damages recoverable were different, so the evidence relevant to damages under Title VII and the common law fraud claim also differed. Section 706(g) of Title VII allows for both legal and equitable relief, but not for compensatory or punitive damages, 42 U.S.C. §2000e-5(g), while on a Missouri fraud claim, actual and punitive damages may be recovered. *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483 (Mo. 1966) (*en banc*).

In the instant case, the evidence before the factfinders was also different. The District Court heard and considered evidence which the jury did not hear, and heard lengthy offers of proof which were never presented to the jury. The District Court's decision was based on

evidence demonstrating the absence of discriminatory distinctions between males and females at Respondent's station while Petitioner was employed. On the other hand, the jury's resolution of the fraud claim was based on specific conversations between Petitioner and Respondent's station manager and news director before Petitioner was hired.

The two cases cited by Petitioner are inapposite, as in those cases the judge and jury decided identical claims based on identical evidence. *Lincoln v. Board of Regents of Univ. System,* 697 F.2d 928 (11th Cir. 1983) (race discrimination under Title VII and 42 U.S.C. §1981); *Caputo v. U.S. Lines Co.,* 311 F.2d 413 (2d Cir. 1963) (liability for personal injury).

Finally, Petitioner asserts that her claim as to the binding effect of the jury verdict is also before the Court in *Bellissimo v. Westinghouse Electric Corporation,* 764 F.2d 175 (3d Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3346 (U.S. November 5, 1985) (No. 85-786). Petitioner is incorrect, for in *Bellissimo* the legal and factual issues tried by the judge and jury were identical, *i.e.,* whether Ms. Bellissimo was discriminated against because of her sex in terms of the salary she was paid (the District Court considered the claim under Title VII, and the jury considered the claim under the Equal Pay Act). (Petition for Writ of Certiorari, No. 85-786, at 26-36). In Petitioner's case, as demonstrated above, the judge and jury issues were in no way identical.

Petitioner therefore presents no substantial federal question, no constitutional issue, nor a dispute among the decisions of the Courts of Appeals. The Petition should be denied.

CONCLUSION

For the above reasons Respondent respectfully submits that the Petition for a Writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

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